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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and SALARY POLICY EMPLOYEE PANEL,

Petitioners,

v.

W. EUGENE BOWMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a labor organization, in contracting to adopt a less vigorous form of union security than an agency shop by granting inducements to employees to pay for their representation through a preference in transfer clause, rather than compulsion by discharge, breaches its duty of fair representation to non-consenting employees in the bargaining unit.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee is unreported. Its full text is contained in an appendix to this petition.

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on Sept. 24, 1984, is reported at 744 F.2d 1207.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Tennessee Valley Authority Act of 1933, 16 U.S.C. Sec. 831-831dd, as amended.

STATEMENT

A.

In industrial relations in this country, payments for the financial maintenance of a collective bargaining agent are obtained from two groups of employees, always separate and distinct. The first consists of those who are willing and voluntary payors. The second consists of those who are unwilling, involuntary payors.

There are only two known methods to obtain payment from the unwilling group. The first is by compulsion—pay or lose your job. That method of obtaining financial support for the bargaining agent has been judicially approved.

The second method eschews compulsion in favor of inducement. The recalcitrant is not compelled by threat of loss of job to do anything. He is offered an inducement—in this case, certain preferences if he would pay the equivalent amount of dues for the support of the bargaining agent. He may decline to financially support the bargaining agent and forego the benefit that would attach to such support.

The Court of Appeals, following established judicial precedent, has recognized that the compulsion

method is legally permissible. But it has held that the inducement method is illegal.

Reduction to its simplest terms leaves this conclusion: One may by contract compel the recalcitrant to pay or else discharge him. But one may not merely induce him to pay and allow him to retain his job. Compulsion is permissible—inducement is not.

The Court of Appeals has constructed this mode of illegality by holding that a labor organization that agrees to an inducement clause breaches its duty of fair representation to the recalcitrant employee.

This holding, and the foundation on which it rests, raises issues of utmost importance, fully warranting review by this Court.

B.

While this case arises in the public sector, where the Tennessee Valley Authority has for decades engaged in collective bargaining with labor unions representing its employees, its content and importance reaches throughout all of American industrial relations because the principles of law contained in it apply with equal persuasion to both the public and private sector.

TVA and the petitioning unions in this case entered into an agreement which all parties believed was a legitimate union security device. Rather than grant a union shop or agency shop to the union negotiators, TVA granted certain preferences to those employees who would voluntarily become union members (or who would make dues-equivalency payments). The preference involved in this case is to allow union members

priority over non-members in rejecting transfer assignments.

TVA has negotiated and executed successive collective bargaining agreements with its white collar unions since 1950 by dealing with a coalition of unions known as the Salary Policy Employee Panel, one of the petitioners herein. Petitioner Office and Professional Employees International Union, AFL-CIO, CLC, hereinafter referred to as OPEIU, is one of five constituent unions that make up the Salary Panel. Respondent Bowman, employed as a land appraiser with TVA, was in a bargaining unit represented by the OPEIU.

In this case, business necessity required TVA to transfer one of its land appraisers from among the group in which Bowman worked. When the pending transfer was made known, there were two non-members in the group, one being Bowman. One of the cardinal elements in this case was that all employees were urged and welcomed at all times, without any restraints, to become participants in the affairs of the unions, which makes it different from any other case involving fair representation in the negotiation of contracts.

One of the remaining two non-participants paid his dues and was welcomed into membership. Bowman refused. The other employees in the group exercised their preference not to transfer, leaving only Bowman. He was ordered to make the move. He refused TVA's directive. For his failure to obey the order of transfer, Bowman was discharged.

He brought suit in the District Court, alleging that petitioners breached their duty of fair representation

to him and that his rights under the First and Fifth Amendment were breached.

The trial record in this case is replete with strong and undisputed evidence that the preference clause was a limited form of union security, adopted in collective bargaining as a substitute for a full union shop or agency shop.

To obtain a union security contract was a primary goal of the unions over all the years of their bargaining history with TVA. A. R. Carson, the Salary Panel's pioneer negotiator, who was a signatory to the original 1950 agreement, told how the unions had unsuccessfully sought union security over the years (Jt. Ex. 30, at 6) when he said:

> "So, just out of the need for self-preservation, as always, the—and not liking free riders, the union was constantly seeking some means of strengthening its position.
>
> "And we asked for a union shop, closed shop, agency shop, or whatever, but every variation you could think of we probably presented to TVA at some time or another."

Carson, who retired in 1974, was followed by equally persistent and equally unsuccessful bargainers. On the other side of the table, Thomas Addington, the chief TVA negotiator in recent years in dealing with the Panel unions, when asked at the trial about the unions' demand for an agency shop, replied, "I've had this on the negotiating table on three different occasions which includes this year . . ." He added that the agency shop had been sought the two previous years as well.

Addington was asked why TVA would not agree to an Agency shop proposal. "We didn't feel like it was

appropriate to provide for a stronger union preference provision in our contract. We felt like the provision that we presently had was sufficient and did not want to increase that."

Thus, it is undisputed that the preference clauses of which transfer was the most prominent) were enacted to achieve union security maintenance goals in a lesser manner than would an agency shop.

Under this limited and less vigorous version of union security, dissenters like Bowman would never be required to join the union or help pay for his representation in any way. He could be a free rider as long as it pleased him and at the same time, he could continue to reap the benefits of collective bargaining. Even the transfer preference clause would not have disturbed his employment had he been willing to accede to the transfer as the price to be paid for his free ride. (One of the anomalies of this case is that Bowman, during the course of the proceedings below, constantly proclaimed that his involuntary transfer was made in derogation of his "seniority rights," all the while unwilling to recognize that "his" seniority rights had only been established by the contract through bargaining by the unions which he so adamantly refused to support).

The District Court, in denying plaintiff's claims, and in granting summary judgment to TVA and the unions, first dealt with the claim of a breach of the duty of fair representation. In its Findings of Fact, it set forth TVA's long-standing policy that "Responsible unions . . . provide an orderly and effective means through which mutual understanding and unity of purpose can be achieved . . . TVA encourages em-

ployees represented by these unions to become and remain members of such unions; and TVA . . . deals with them and their constituent unions in a manner which recognizes their contribution, and the contribution of the employees they represent, to the TVA program." It further found as a fact that several instances cited by TVA supported its policy in favor of union activity, and additionally found that the relationship between TVA and its employee bargaining representatives had resulted in the promotion to management level positions of several employees who were formerly active in union affairs (Findings of Fact 13, 15, 16, 17, 18).

The District Court concluded that unions who were parties to contracts with TVA were subject to the duty of fair representation, a point that was not contested by petitioners in the Court of Appeals. Its key conclusion, No. 30, stated: "The union preference provision here at issue was the subject of negotiation. The TVA has found, correctly or not, that union membership is an advantage to the TVA. The provision undoubtedly encourages union membership, and discourages 'free riders.' The provision is, therefore, not arbitrary."

This conclusion of law that the provision encouraged union membership and discouraged free riders and was not arbitrary is at the essence of this case.

In its Conclusion 32, the trial court said: "The Court is also of the opinion that, taking into account that this provision was forged in the crucible of collective bargaining, the transfer provision is not unfairly discriminatory." Therefore, there was no breach of the duty of fair representation.

The District Court likewise rejected the constitutional claim of Bowman. It agreed with petitioners that this claim was resolved by *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977). Its Conclusion 37 followed: "The Court is of the opinion the agency interests advanced by this provision are much the same as those promoted by similar provisions in the federal labor law. See *Abood,* 431 U.S. at 224."

The conclusion that the transfer clause was an agency interest much the same as in *Abood* is, we submit, a correct statement of the law.

The Court of Appeals found it unnecessary to reach the constitutional question. It treated the *Abood* decision in Part IV of its opinion in this manner: "The only issue in *Abood* was the constitutionality of the agency shop agreement. This agreement was attacked on the ground that it violated First Amendment rights of non-union teachers. There was no separate claim that the negotiation and enforcement of the agreement violated the union's statutory duty of fair representation."

The Court of Appeals, in Part II.B., took up petitioners' arguments below that if an agency shop provision were valid, a lesser form of union security would likewise pass muster. It then said that the District Court did not adopt petitioners' arguments, when in fact, the recitations set forth earlier demonstrate that the District Court totally concurred with what the unions had maintained before it. The "agency interests" recognized by the trial court were at the core of petitioners' defense.

The Court of Appeals, however, disagreed with the District Court's finding that no discrimination was

involved. The agreement's fatal flaw, as that Court viewed it, in Part III.B., was that it favored "one group of unit employees over another . . ." It went on to say in Part III.C. that, "The duty of fair representation, under these circumstances, prohibited the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment."

Having thus characterized the duty of fair representation, the decision was forthcoming that any contractual arrangement for union security, unless it compelled all employees to become payors of dues-equivalency, would be discriminatory because there would be disparate treatment between "members" and "non-members."

Thus, the issues are presented upon which we seek the grant of the writ.

REASONS FOR GRANTING THE WRIT

I. For the first time in the law, the duty of fair representation has been extended to contract negotiations to proscribe a legitimate union interest

An appellate court for the first time has found that a union has breached its duty of fair representation during contract negotiations by making a bargaining compromise related to legitimate trade union goals.

We begin with the fundamental proposition that contracting for union security by inducing the widest possible participation in union affairs is a legitimate and accepted trade union goal in American labor law. In this case, we have an uncontradicted record replete with evidence that petitioners valiantly, but albeit unsuccessfully, sought the widest and most

clearly permissible form of union security in their contracts with TVA. Unable to obtain this goal, the unions settled for something somewhat less—a clause granting preference in transfers to those employees who did join the union, therefore inducing more to join to take advantage of the preference.

The Court of Appeals has now proscribed that lesser resolution. It has held that to adopt such a clause breaches the unions' duty of fair representation to those who have not become members.

No court to this point has ever held that a labor organization may breach its duty of fair representation by engaging in collective bargaining to procure a provision that is not invidious or unrelated to legitimate union objectives. The essential genesis of the doctrine itself arose when a union negotiated with goals that were in fact invidious, such as racial discrimination. *Steele* v. *Louisville & Nashville Ry.*, 323 U.S. 192 (1944), is the classic case. To discriminate based upon race or sex or any basis that is not intrinsically related to the achievement of better wages, hours, and working conditions for the benefit of the whole is invidious conduct.

Here, Bowman and all others who chose not to pay their fair share of the cost of union administration were urged and welcomed to participate. The unions' efforts to compel them to do so with an agency shop that would have cost Bowman his job if he declined to pay is a legitimate union objective. The objective in agreeing to the inducement-by-preference-in-transfer was ultimately the same—securing the maximum participation by payment of dues-equivalency. This is not invidious where all were welcomed—it is more

akin to striving for fullest democratic participation by inducement rather than compulsion.

The duty of fair representation has been applied, of course, in the two separate and distinct areas where unions may be vulnerable: (1) contract negotiations, and (2) contract administration. Because of its frequency, the latter has gained more judicial attention in recent years, in cases flowing from *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and similar cases where a union has been involved in grievance processing. Because of the values inherent in contract negotiations, there is a substantial difference between the two, which the law should recognize, and which this Court certainly has with its fundamental theory of "wide range of reasonableness" that came from *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953), and its progeny.

But whether the duty has arisen in contract negotiations or in grievance administration, this Court has provided us again and again with what must be established to show a breach, but never more clearly than in *Lockridge* v. *Amalgamated Transit Union,* 403 U.S. 274 (1971), where it said:

> The duty of fair representation was judicially evolved, without the participation of the National Labor Relations Board, to enforce fully the important principle that no individual may suffer *invidious, hostile* treatment at the hands of the majority of his co-workers. When such union conduct is proved, it is clear, beyond doubt, that the conduct could not be otherwise regulated by the substantive federal law. And the fact that the doctrine was originally developed and applied by the courts, after passage of the Act, and *carries with it the need to adduce substantial*

> *evidence of discrimination that is intentional, severe and unrelated to the legitimate union objectives* insures that the risk of conflict with the general Congressional policy favoring expedient centralized administration, and remedial action, is slight. (Emphasis supplied.)

The unions' conduct here was not intentionally discriminatory, since its purpose was to encourage all to pay their fair share of the cost of maintaining the bargaining agent. It was not severe, any more than to seek to negotiate any union security agreement is severe. And it was not unrelated to a legitimate union objective—since all it sought was the most obtainable and allowable form of union security.

In the contract-negotiating cases that came after *Steele,* this Court was faced more often with what was permissible than what was not, under the "invidious goals" standards. This is the great significance of *Ford Motor* v. *Huffman, supra,* where the wide range of reasonableness was the bellwether of that holding, with this critical qualification: "subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

The conduct of petitioners in this case was a model of complete good faith and honesty of purpose.

Later cases such as *Aeronautical Lodge* v. *Campbell,* 337 U.S. 522 (1949), and *Humphrey* v. *Moore,* 375 U.S. 335 (1964), were in the same vein. While the former was not a duty of fair representation case, it affirmed the bounds of reasonable that was now the standard of the law when a union negotiated a seniority clause that gave preference to union contract administrators. *Humphrey* showed that there

was no breach of the duty in reaching an agreement when legitimate goals were involved and where there was no invidious treatment of the membership.

The Court of Appeals in its decision has in effect said that honesty of purpose and legitimate union goals are of no consequence when a union agrees to a clause that would have the effect of discriminating against unwilling payors by denying them equality of transfer privileges with payors, altogether ignoring critical reality that in an agency shop contract, the unwilling payor would not confront the transfer-preference clause because he would have suffered the ultimate work-discrimination of loss of his job—a discrimination that has heretofore been held reasonable.

II. The question of whether national labor policy permits a labor organization and an employer to contract for a lesser form of union security than an agency shop or a union shop is an issue of first rank importance that should be reviewed by this Court

On the facts of this case, it is indisputable that the sole purpose of the preference in transfer clause was to adopt a lesser form of union security than an agency shop. The Court of Appeals did not disagree that this was its purpose—it merely held that regardless of purpose, such a lesser clause was invalid and discriminatory. Although it said that the transfer clause was not a "form of agency shop agreement,"[1] it did not dispute why petitioners adopted it.

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[1] The Court of Appeals misperceived petitioners' argument on this point, although it may be a play on words. It was not argued that the transfer provision was a form of agency shop, but rather a lesser form of union security than an agency shop.

The discussion of the Court of Appeals is in jarring disharmony with this Court's teaching in *NLRB* v. *General Motors,* 373 U.S. 734 (1963).

While the issue in *General Motors* arose over the scope of the duty to bargain over an agency shop within the state of Indiana, this Court probed into lesser forms of union security than a union shop because the erring Court of Appeals applied the statutory term of "membership" so literally and totally ignored the national labor policy behind union security arrangements.

In *General Motors,* this Court gave forthright approval to National Labor Relations Board holdings at that time that did approve lesser forms of union security than a requirement of absolute membership. It particularly cited, at 373 U.S. 739, the Board's ruling in *Public Service Co. of Colorado,* 89 NLRB 418, upholding the validity of a monetary service fee of $2 a month.

Then, equally significant, this Court italicized these underscored words in the same opinion paragraph, in quoting from its prior opinion in *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U.S. 301, at 307, in dealing with the purpose of old Sec. 8(3) of the Wagner Act: "The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop *or other forms of union-security agreement.*"

Indeed, this Court went a step further when it candidly remarked: "There is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act the union shop, then it also intended to preserve the status of less vigorous, less

compulsory contracts which demand less adherence to the union." 373 U.S. at 741.

The provision invalidated in this case is indeed a less vigorous and less compulsory contract than a union shop or agency shop agreement. It was intentionally designed (by TVA at least) to demand less adherence to the union than if an employee were compelled under pain of discharge to pay full dues-equivalency to the union.

Accordingly, the question of how permissible are less vigorous union security provisions than an agency shop comes full front. Also involved is the national labor policy of promoting industrial peace. While this case arises in the public sector, where strikes are forbidden, the principles adopted by the Court of Appeals will surely apply equally to the private sector. If nothing less than a full agency shop is legally permissible, unions may well be required to strike for an agency shop or union shop where they might otherwise be disposed to settle for something "less vigorous," as petitioners did in this case.

Accordingly, the permissibility of contracting for valid interests in union security which are less than an agency shop–union shop is an important issue meriting review by this Court.

III. The treatment by the Court of Appeals of the inherent Constitutional issue in this case undermines this Court's decision in *Abood* v. *Detroit Board of Education*

In Part IV of its opinion, the Court of Appeals pointedly dismissed petitioner's reliance on *Abood* v. *Detroit Board of Education, supra,* by saying that

the only issue in that case was the constitutionality of the agency shop. "There was no separate claim that the negotiation and enforcement of the agreement violated the union's statutory duty of fair representation," it said.

This is a clear signal to litigants in the future to resist even the agency shop on claims of the breach of the duty of fair representation. And why not a union shop as well? Is any union negotiating such a clause breaching its duty to those who desire not to join by imposing discharge upon them for failure to do so?

Abood may not be so casually distinguished. Its foundations go to the central core of what is discriminatory and what is not discriminatory. The Court of Appeals' principal argument for reaching its result was that the contract clause was invalid because it "discriminated" against those like Bowman who would take a free ride and refuse to pay the dues-equivalency fee. We need only say again that the discriminatory impact upon unwilling payors under an agency shop contract is that they lose their jobs while those who do pay do not lose their jobs. If this is discriminatory, *Abood* stands for the proposition that such "discrimination" designed to further union security interests is permissible.

IV. The holding of the Court of Appeals takes away flexibility from parties in collective bargaining in seeking solutions to the important questions of compulsory support for the bargaining agent

Labor union antipathy to the free rider is endemic in American trade unionism. The fairness concept

that all of us should pay our share of the taxation necessary to finance the benefits we obtain is deeply ingrained. Blind hostility to labor organizations of persons like Bowman who want all the rewards (such as seniority rights in transfers) without paying the cost of obtaining those achievements is equally a fact of life. Accommodation between those conflicting views is the law's attempt at peaceful resolution. The ruling below makes it much more difficult to find any area of accommodation between these polar positions. Its restrictive narrowness, like that of its predecessors of more than two decades ago in *General Motors, supra,* focusing on "discriminatory" as a disfavored word rather than analyzing what is and what is not discriminatory in the context of the law of collective bargaining has done a disservice to the critical goals of peaceful and fair resolution of these kinds of disputes, for better or for worse.

This is yet another reason why the writ should be granted.

CONCLUSION

For all the reasons set forth above, the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CIV-1-80-98

W. EUGENE BOWMAN

- VS. -

TENNESSEE VALLEY AUTHORITY, SALARY POLICY EMPLOYEE PANEL; and,
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed May 13, 1983]

This is an action by a former employee of the Tennessee Valley Authority (TVA) brought against TVA, the Salary Policy Employee Panel (SPEP)—the collective bargaining agent for TVA salaried employees, and the Office and Professional Employees International Union (OPEIU)—an international labor organization and a member of the SPEP. The action is based upon the plaintiff's allegedly unlawful termination pursuant to his refusal to accept a transfer. The parties have submitted extensive briefs, proposed findings of fact and conclusions of law, and a set of stipulated facts and exhibits, and a trial was conducted to Judge Frank W. Wilson sitting without a jury, in accordance with the agreement of the

parties. Before findings of fact and conclusions of law had been entered, however, Judge Wilson died. This necessitates an examination of Fed. R. Civ. P. 63, which provides:

> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are tiled, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Rule 63 by its terms applies only to cases where the disability occurs after findings and conclusions have been filed. *Whalen* v. *Ford Motor Credit Co.,* 684 F.2d 272 (4th Cir. 1982); *Thompson* v. *Sawyer,* 678 F.2d 257 (D.C. Cir. 1982); *Arrow-Hart, Inc.* v. *Philip Casey Co.,* 552 F.2d 711 (6th Cir. 1977). This is not such a case. However, the parties have stipulated, unanimously, that the case may be decided by a successor judge (Court File #27). In addition, as such a successor judge, the Court is of the opinion that it is competent to make a just determination of the issues upon the record. Therefore, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the *Federal Rules of Civil Procedure.*

Findings of Fact

1) The Plaintiff is a former employee of the TVA. He was employed in the Land Branch as a land appraiser. This position was classified by the TVA as SA-3, which meant that it was a salaried position in the administrative schedule. This position was subject to the Articles of Agreement between the TVA and the SPEP, and the position was also within the bargaining unit at TVA represented by the OPEIU.

2) The Articles of Agreement is the collective bargaining agreement between the TVA and the defendant unions.

3) The defendant TVA is a governmental corporation created and controlled by the United States government, and is subject to the TVA Act. 16 U.S.C. §§ 831-831dd, *as amended.*

4) The defendant SPEP is an organization of five member labor organizations. Its purpose is to act as the collective bargaining agent for TVA's salary policy employees, of which the plaintiff is one.

5) The defendant OPEIU is an international labor union, and a member of the SPEP, which represents the plaintiff's bargaining unit within TVA.

6) Under the Articles of Agreement, the defendant unions are the exclusive bargaining agents of the employees whom they represent. (Articles of Agreement, art. I. A.)

7) The plaintiff was employed by the TVA in its Chattanooga Office until the summer of 1979. At that time there were three other land appraisers in

the Chattanooga office: Thomas W. Elder, William A. Trundle, and Marion A. Wright.

8) In May, 1979, it was decided by the Chief of the Land Branch, Conro L. Olive, Jr., that one of the land appraisers in the Chattanooga office should be transferred to Florence, Alabama. The procedure for choosing which appraiser to transfer was contained within the Articles of Agreement, Supplementary Agreement 7:

> (1) First, employees at the surplus location are given an opportunity to request transfer to the vacant position. Among those who request transfer, the union members have preference for transfer, and among union members, the one with the earliest current service date has the highest preference.
>
> (2) If no employee at the surplus location requests transfer, an employee at the location may be directed to transfer. In selection among employees at the surplus location for directed transfer, the union members have preference for retention at that location, and among union members the one with the earliest current service date has the highest retention standing.

(Stipulation ¶ 5).

9) On May 11, 1979, Mr. Olive sent a letter to each of the appraisers at the Chattanooga office setting out the procedure to be followed and the need for the transfer of an appraiser to Florence. The letter stated that unless volunteers for transfer were forthcoming, the plaintiff would be directed to transfer because he was the junior non-union member, even though he was

senior to one of the union members. There were no volunteers, and plaintiff was directed to transfer to Florence on or before July 2, 1979. Because of requests by the plaintiff, the reporting date was extended to September 4, 1979.

10. When the plaintiff did not report to Florence, his termination was proposed on September 5, 1979. The plaintiff was terminated effective October 29, 1979, and received notice of this termination from TVA's Director of Property and Services, which notice was dated October 23, 1979.

11) When it was announced that the plaintiff had been selected to be transferred, Thomas W. Elder, the other appraiser who was not a union member, joined the union. Eventually, Marion Wright was transferred because of less TVA seniority, even though Wright had more union seniority.

12) As a consequence of this termination, the plaintiff pursued three separate grievance procedures, all of which were denied. Only the first of these, the one alleging that his transfer was solely because of his status as a non-member of the union, is relevant here.

13) The union preference provision, which occasioned the plaintiff's directed transfer, is a part of the Articles of Agreement. Another part of this agreement, Supplementary Agreement 5, states TVA's, and the union's, purpose in agreeing to such a provision:

> "Membership on the part of employees in an employee union which is or becomes a party to this agreement and participation in the activities

> of the organization are recognized as improving relations between management and employees and promoting employee efficiency and understanding of TVA policy, thereby contributing to the accomplishment of TVA objectives. Therefore, such membership and such participation are among the positive factors of merit and efficiency to be considered in selecting employees for promotion, transfer, and retention."

Such union preference provisions as that in issue here, or, as they are often called, union security provisions, have been a part of the Articles of Agreement since they were first negotiated in 1950.

14) In order to become a union member, it is necessary only for the TVA employee to pay the dues.

15) The policy of the TVA toward labor-management relations is set out in TVA Code III UNION RELATIONS, PM Section 5:

> "The success of TVA's program depends to a large degree on mutual understanding and unity of purpose among employees and between employees and management. Responsible unions recognized by TVA as exclusive representatives of employees in defined bargaining units, and working together through the Salary Policy Employee Panel and the Tennessee Valley Trades and Labor Council, provide an orderly and effective means through which mutual understanding and unity of purpose can be achieved. Through them employees participate in forming and administering the personnel policies and rules un-

der which they work and in increasing interest, initiative, and cooperative effort on behalf of the TVA program. For these reasons TVA encourages employees represented by these unions to become and remain members of such unions; and TVA negotiates agreements with the Salary Policy Employee Panel and the Tennessee Valley Trades and Labor Council and otherwise deals with them and their constituent unions in a manner which recognizes their contribution, and the contribution of the employees they represent, to the TVA program."

(Stipulation ¶ 14, joint exhibit #17).

16) TVA Personnel Manual Instruction, QUALIFICATION APPRAISAL, Union Membership, PM Section 5, explains TVA's position on the application of the union preference transfer provision of Supplementary Agreement 5:

"The purpose of this provision is to remind supervisors, in a work situation where democratic participation of employees through their own organizations is encouraged as a matter of policy, that the response of the individual employee to the opportunity for such participation is one of the factors to be taken into account in selection for promotion, transfer, or retention. * * * Consideration of these factors is not construed as a "reward" for organizational activity, but as relevant to the extent that they have a definite relationship to the efficiency of the working unit or TVA as a whole."

17) There are several instances cited by the TVA as bearing out the correctness of TVA's policy in favor of union activity stated in several provisions of the Articles of Agreement, including the cooperative conference program (Stipulation ¶ 16, and those enumerated in the testimony of Thomas H. Addington, TVA's Chief of Salary Policy Contract Administration.)

18) This relationship between TVA and its employees' bargaining representatives has resulted in the promotion to management level positions of several employees who were formerly active in union activities.

19) The dues paid by members of the OPEIU go to pay the administrative costs, salary and travel expenses of union executives, expenses of members' participation in TVA committees, and the cost of grievances under the Articles of Agreement. There was no evidence that any part of a member's dues was spent on politics of any kind. It is also undisputed that although the OPEIU constitution contains provisions for the discipline of members, no TVA member has ever been so disciplined.

Conclusions of Law

20) This Court has subject matter jurisdiction of this case pursuant to 28 USC §§ 1331(a) & 1337.

Duty of Fair Representation

21) The plaintiff's first contention is that the defendant SPEP violated its statutory duty of fair representation in negotiating the allegedly discrimi-

natory union preference provisions in the Articles of Agreement.

22) The defendant TVA is excepted from the provisions of the National Labor Relations Act. 29 USC § 152(2). Thus the collective bargaining agreement between TVA and the SPEP is not governed by that statute. There can be no statutory duty of fair representation, therefore, in the sense in which that term is usually understood. *See Vaca* v. *Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842, 850 (1967); *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, 199, 65 S.Ct. 226, 89 L.Ed. 178, 181 (1944).

23) The plaintiff argues, however, that a duty of fair representation arises from the TVA Act. 16 USC §§ 831 *et seq.* The plaintiff argues that the TVA relies upon the TVA Act, *id.* § 831b, for authority to bargain collectively with the defendant SPEP, and for authority to recognize the SPEP as the exclusive bargaining agent for the employees in the relevant bargaining unit. If the Act gives TVA the authority to do this, then by analogy to the cases decided under the NLRA and the Railway Labor Act, the TVA Act must also confer upon the union a duty to represent each employee in the bargaining unit fairly and without discrimination.

24) This Court has previously held that unions that are parties to collective bargaining units with the TVA are subject to a duty of fair representation. *Hogan* v. *Local 226, International Brotherhood of Painters & Allied Trades*, CIV-1-82-389, memorandum op. at 6-7 (E.D. Tenn., April 6, 1983). The Court is of the opinion that in this case the union or the SPEP has not breached its duty of fair representation.

25) In determining whether the duty of fair representation was breached, the Court must analyze the question under analogous NLRA cases.

26) The plaintiff argues that by negotiating and enforcing a transfer policy that prefers union over non-union employees, the defendant unions have acted unfairly and discriminatorily in their treatment of non-union employees.

27) Assuming that the defendant unions have a duty of fair representation, that duty

> ". . . includes a[n] . . . obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

Vaca v. *Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842, 850 (1967).

28) The Court in *Vaca* also defined a breach of the duty of fair representation as occurring "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca,* 386 U.S. at 190, 17 L.Ed.2d at 857; *accord Ruzicka* v. *General Motors Corp.,* 523 F.2d 306, 309, *reh'g denied,* 528 F.2d 912 (6th Cir. 1975).

29) In applying this statement to the facts of an individual case, a court should bear in mind that when a disgruntled employee attacks a contract provision as discriminatory, as here,

> "Because the bargaining process demands compromise of individual worker interests, an employee disadvantaged by a contract has no claim

> of unfair representation against his union unless he can demonstrate actual bad faith in negotiation."

Comment, *Fair Representation in the Arbitration of Grievances—The Eighth Circuit Adds Another Straw*, 47 TENN. L. REV. 631, 632 (1980) (*citing Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953)); *accord Humphrey* v. *Moore*, 375 U.S. 335, 349, 84 S.Ct. 363, 11 L.Ed.2d 370, *reh'g denied*, 376 U.S. 935, 84 S.Ct. 697, 11 L.Ed.2d 655 (1964); *cf., Jones* v. *Trans World Airways, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974). This means that a court should not be hasty to find provision which may have been the subject of intense negotiation to be unlawfully discriminatory.

30) The union preference provision at issue here was the subject of negotiation. The TVA has found, correctly or not, that union membership is an advantage to the TVA. The provision undoubtedly encourages union membership, and discourages "free riders." The provision is, therefore, not arbitrary.

31) There has been no evidence of any bad faith on the part of the union in bargaining for this provision.

32) The Court is also of the opinion that, taking into account that this provision was forged in the crucible of collective bargaining, the transfer provision is not unfairly discriminatory.

33) It is the conclusion of the Court, therefore, that the defendant unions have not breached their duty of fair representation.

First Amendment

34) The plaintiff argues that the union preference provision at issue here acts as an impermissible restraint on the free exercise of his rights under the first amendment of the United States Constitution; more specifically, the plaintiff argues that this provision operates to require him to associate in violation of his right not to associate with those whose views he finds objectionable.

35) The Court finds that this case is controlled by *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, *reh'g denied*, 433 U.S. 915, 97 S.Ct. 2989, 53 L.Ed.2d 1102 (1977).

36) In *Abood* the Court found that a provision requiring employees who were not union members to pay a service fee equal to union dues was not violative of the First Amendment, except to the extent that such fees were used for purposes other than financing union administration and negotiation. *Abood*, 431 U.S. at 222, 235-36, 52 L.Ed.2d 276, 285; *see also Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 238, 76 S.Ct. 714, 100 L.Ed. 1112, *reh'g denied*, 352 U.S. 859, 77 C.Ct. 22, 1 L.Ed.2d 69 (1956) and *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961).

37) The Court is of the opinion that the agency interests advanced by this provision are much the same as those promoted by similar provisions in the federal labor law. *See Abood*, 431 U.S. at 224, 52 L. Ed.2d at 277.

38) The evidence in this case is that the union dues are not used for "political" purposes.

39) The facts in this case and those in *Abood* are different. In *Abood* the employee received the benefit of collective bargaining whether a union member or not, but was required to pay. In this case, the employee is not required to pay, but must do so in order to receive the full benefits of collective bargaining. The Court is of the opinion, however, that the system at issue here is no more intrusive upon First Amendment rights than that in *Abood*.

40) The Court concludes that neither the transfer provision nor the plaintiff's termination under it violates the First Amendment.

Fifth Amendment

41) The plaintiff advances two arguments under the Fifth Amendment to the Constitution. First, he argues that he had a property interest in that he had a reasonable expectation of continued employment. This is plainly not the case. TVA employees have no vested interest in continued employment. *See Ramsey* v. *Tennessee Valley Authority*, 502 F.Supp. 230, 232 (E.D. Tenn. 1980).

42) The plaintiff's reliance upon section 6 of the TVA Act is misplaced. That section, requiring the appointments and promotions to be based upon merit and efficiency, does not create a property interest to an individual TVA employee. *Compare Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) *with Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

43) Even though the plaintiff has no property interest in his job, he can argue under the Fifth

Amendment's due process clause that TVA's action was arbitrary and capricious. Since TVA's action in agreeing to the provision at issue is reasonably related to ensuing good relations between management and labor, the Court is of the opinion that it is not arbitrary and capricious.

44) The plaintiff's second argument under the Fifth Amendment is that this section violates the equal protection aspects of the Amendment. *See Mathews* v. *deCastro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, (1954).

45) Since there is no fundamental right or suspect classification involved here, the provision does not violate equal protection unless it bears no rational relationship to a legitimate government interest. *See San Antonio Independent School Dist.* v. *Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, *reh'g denied*, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973). As stated above with regard to the due process clause, this provision bears a rational relationship to a legitimate governmental objective; *i.e.*, preserving labor relations and, in TVA's view, facilitating TVA's mission.

46) The Court is therefore of the opinion that the plaintiff's claims under the Fifth Amendment must fail.

Section 6 of the TVA Act

47) The plaintiff's final argument is that the transfer provision violates section 6 of the TVA Act, 16 USC § 831e, which provides:

> "In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

48) The Court is of the opinion that even if plaintiff, as an individual employee, had a right of action under this section, TVA has not violated it.

49) As the Court earlier found, the TVA and the unions have agreed that union membership is an indicia of merit and efficiency (SA 5). There is no evidence in the record which would justify ignoring this agreement, or finding it to be contrary to the truth.

50) The plaintiff has stated no claim under 16 USC 831e.

Conclusion

Having entered the above Findings of Fact and Conclusions of Law, the Court is of the opinion that judgment should enter for the defendants.

An appropriate order will enter.

May 19, 1983.

/s/ WILLIAM P. GRAY
United States District Judge